

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALVIN D. BARNER,

Petitioner,

vs.

DONALD HELLING, *et al.*,

Respondents.

3:06-cv-00543-LRH-RAM

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court following initial review under Rule 4 of the Rules Governing Section 2254 Cases of the amended petition (#39) filed by the Federal Public Defender. Following upon said review, a response will be directed.

In reviewing the matter, it would appear that resolution of a number of possible defenses, if otherwise supported by the record, potentially would be intertwined with merits issues on a claim of actual innocence. The issues and defenses potentially intertwined with merits review include the issue of whether the successive petition should be dismissed pursuant to 28 U.S.C. § 2244(b)(2) as per the prior show cause order (#22) as well as any applicable federal time-bar or procedural default defenses otherwise supported by the record. It further would appear that any defenses going to the requisite specificity and/or sufficiency of the allegations in the amended petition similarly would be most efficiently resolved in this particular case in conjunction with merits review. The only defense that would appear to be more efficiently resolved on a separate prior motion to dismiss in advance of merits review in this case would appear to be any exhaustion defense otherwise supported by the record.

1 IT THEREFORE IS ORDERED that respondents shall have forty-five (45) days from entry of
2 this order within which to answer, or otherwise respond to, the amended petition, including by motion
3 to dismiss, **subject to the further provisions below.**

4 IT FURTHER IS ORDERED that if the respondents assert an exhaustion defense, they shall do
5 so in a separate motion to dismiss presenting only the exhaustion defense without other defenses. All
6 other defenses, if any, shall be consolidated with a full answer on the merits. The respondents shall not
7 be deemed to have waived any defenses by addressing the issues in the order directed by the Court.
8 In any answer filed, the respondents shall specifically cite to and address the applicable state court
9 written decision and state court record materials on the claim presented within the argument on the
10 claim.

11 IT FURTHER IS ORDERED that any additional exhibits filed by the respondents shall be filed
12 with a separate index of exhibits identifying the exhibits by number or letter. The CM/ECF attachments
13 that are filed further shall be identified by the number or numbers (or letter or letters) of the exhibits
14 in the attachment. Cf. ## 40-44. The purpose of this provision is so that the Court, the parties, and any
15 reviewing court thereafter will be able to quickly determine from the face of the electronic docket sheet
16 which exhibits are filed in which attachments.

17 IT FURTHER IS ORDERED that petitioner shall have thirty (30) days from service of the
18 answer, motion to dismiss, or other response to file a reply or opposition.

19 DATED this 14th day of April, 2009.

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23 _____
24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
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